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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2197/2012

Decision adopted by the Committee at its 110th session (10-28 March 2014)

Submitted by:	X.Q.H. (represented by Frank Deliu)
Alleged victim:	The author and her son
State party:	New Zealand
Date of communication:	22 March 2012 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 October 2012
Date of adoption of decision:	25 March 2014
Subject matter:	Deportation to China
Substantive issues:	–
Procedural issues:	Victim status; exhaustion of domestic remedies; lack of substantiation
Articles of the Covenant:	17, para. 1; 23, para. 1; 24, para. 1; 14, para. 1; 2, para. 3 (a)
Article of the Optional Protocol:	1, 2, 3 and 5, para. 2 (b)

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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 2197/2012*

Submitted by:	X.Q.H. (represented by counsel Frank Deliu)
Alleged victims:	The author and her son
State party:	New Zealand
Date of communication:	22 March 2012 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2014,

Adopts the following:

Decision on admissibility

1.1 The author of the complaint, dated 22 March 2012, followed by a further submission dated 2 May 2012, is Ms. X.Q.H., who is a citizen of China. She submits her communication on her own behalf as well as on behalf of her son, a New Zealand national born on 20 November 2000. She claims that New Zealand has violated her rights as well as those of her son under articles 17, paragraph 1; 23, paragraph 1; 24, paragraph 1; and article 14, paragraph 1; and 2, paragraph 3 (a), of the Covenant. She is represented by Frank Deliu from the Amicus Barristers Chambers.[1]

1.2 On 8 March 2013, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be examined separately from its merits.

The facts as presented by the author

2.1 The author alleges that she arrived in New Zealand on 27 April 1996, after being subjected to violations of her rights by the Chinese authorities. In March 1990, she was

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlatescu.

[1] The Optional Protocol entered into force for the State party on 26 May 1989.

forced to terminate a pregnancy by her doctor, who informed the street committee[2] that she was expecting her second child, in breach of the one-child policy in China. In August 1994, she fell pregnant again. In order to protect herself and her future child, she fled Guangzhou to go and stay in the countryside. However, the doctor informed the street committee of the author's pregnancy and they began to search for her, threatening and detaining members of her family until they informed the authorities of her location. By the time the author was found, she was approximately six months pregnant. The street committee brought the author back to Guangzhou and her pregnancy was terminated against her will. As a result, she lost a substantial amount of blood and had to remain hospitalized for a week.

2.2 The author and her then partner arrived in New Zealand on 27 April 1996 and 10 December 1996 respectively. They were both granted short-term visitor permits on arrival, which expired in due course. Eight days after her arrival in New Zealand, the author lodged a claim for refugee status. On 24 November 1997, the Refugee Status Board (RSB) declined her claim. The author appealed the decision to the Refugee Status Appeals Authority (RSAA), but her appeal was rejected on 3 April 1998. On 16 November 1998, the author was located and was issued with a removal order. She lodged an appeal with the Removal Review Authority (RAA) on 22 December 1998. On 13 December 1998, she lodged an application for another RSAA hearing on the basis that there had been a misunderstanding between her and her previous solicitors. The application was granted and her appeal was heard on 29 March 1999. On 17 June 1999 the RSAA dismissed that appeal.

2.3 On 2 August 2000, the RAA released its decision regarding the author's appeal dated 22 December 1998. At that time, the author was pregnant. Given that the author had already had two forced terminations of pregnancies whilst in China, the RAA found that there were exceptional circumstances of a humanitarian nature such as to make it "unjust or unduly harsh for her to return to China whilst pregnant". The RAA ordered the cancellation of the removal order and held that the author should be allowed to remain in New Zealand until she had given birth and fully recovered, and provided the author with a visitor's permit valid until 28 February 2001. In November 2000, the author and her partner married, and their son was born in New Zealand, thereby acquiring New Zealand nationality.

2.4 On 17 April 2001, a letter was written on behalf of the author to the Minister of Immigration asking for a special authorization to lodge a residence application under the humanitarian category. On 29 May 2001, the Minister advised that she was not prepared to intervene to grant the residence application. On 1 July 2001, the temporary permits for the author and her then husband expired. On 2 October 2001, the author lodged a further claim for refugee status. She was interviewed on 14 December 2001. The RSB rejected her claim on 18 February 2002. On 25 February 2002, the author lodged an appeal against the RSB decision with the RSAA. This appeal was withdrawn on 3 December 2002.[3] The author had also lodged an appeal to the RAA on 10 August 2001. This appeal was dismissed by the RAA on 27 June 2003. Further representations were made to the Associate Minister of Immigration. On 15 June 2004, the Associate Minister advised that he was not prepared to intervene.

2.5 Removal orders were served on the author and her husband on 19 September 2005 and 12 September 2005 respectively. Her husband was removed from New Zealand and is in China. The author is still living in New Zealand. The application to the High Court for judicial review of the decision to remove the author was examined and the trial Judge ruled[4]

[2] In the 1980s/90s, neighbourhood committees/street committees were heavily involved in law enforcement and mediation of disputes at the local level.

[3] The author does not explain why she withdrew the appeal.

[4] HC Auckland CIV-2005-404-5202, of 29 December 2006, see annex B.

that the decisions to remove the author were reasonable in the administrative law sense. The interim orders applications, as well as the substantive appeal lodged by the author, were unsuccessful.[5] In March 2010, the author divorced from her husband. In November 2011, she married a New Zealand citizen.

The complaint

3.1 The author considers that as a mother of a child who has New Zealand citizenship and given that she is now married to a New Zealand citizen, it is in the best interests of the extended family that she remains in New Zealand. She considers that, by removing her to China, the State party would violate her rights as well as the rights of her child, under articles 14, 17, 23, 24 and 2, paragraph 3, of the Covenant.

3.2 The author considers that her deportation would prejudice the rights of her son, who is a New Zealander and who has always lived in New Zealand. She specifies that her son could not become a Chinese citizen without relinquishing his New Zealand nationality. Further, he is not the first child of the author, and he is therefore considered as a "black child" in China. As such, he cannot be registered as part of his family's household and, in the event of returning to China, would not be given access to medical care, education or employment, unless the author could afford to pay a substantial fine as a punishment for breaching the family planning regulations. The author further argues that her son has had asthma since he was born, that he needs regular treatment with inhalers, and that his health would be affected in the event of returning to China because of the pollution and dampness.

3.3 The author refers to the Committee's jurisprudence, considering that the circumstances of her case fall within the "exceptional circumstances" identified in *Winata* v. *Australia*,[6] under which the Committee considered that a State party's refusal to allow one member of a family to remain in its territory would amount to interference in that person's family life. In the present case, her son was 12 at the time of the complaint, and he had only known New Zealand as his home. The author considers that if she is deported by the State party, both biological parents of her son would have to be in China, and the family would be under the obligation to choose between the author's leaving her son without his mother in New Zealand, or his going with her to China, where he has never been before. The author therefore considers that the decision of the State party to deport her constitutes an "interference" with their family life. Further, given that her son's biological father was expelled with a five-year ban on returning to New Zealand, the author considers it highly probable that, by analogy, she would be subject to the same ban. In this regard, the author refers to the Committee's jurisprudence in *Sahid* v. *New Zealand*:[7] in this case, the complaint was dismissed because "the author's removal [had] left his grandson with his mother and her husband in New Zealand". The author argues that her son has no other immediate relatives in New Zealand, and that to separate a child from both his biological parents would amount to a clear breach of articles 17 and 23 of the Covenant for the author and her son, and of article 24 for her son alone.

3.4 As regards her claims under articles 2 and 14, the author argues that the State party failed to apply the "proper legal test" during the asylum process for her partner, and that the relief to which she considers that her family should have been entitled was refused, without her being given an opportunity to be heard on the matter. The author further argues that the

[5] *X.Q.H.* v. *Minister of Immigration*, CA 236/06, 18 December 2006; and *X.Q.H.* v. *Minister of Immigration* (2009) 2 NZLR 700 (CA), annexes C and D.

[6] Communication No. 930/2000, *Winata* v. *Australia*, Views adopted on 26 July 2001.

[7] Communication No. 893/1999, *Sahid* v. *New Zealand*, Views adopted on 28 March 2003.

Supreme Court failed to engage in a proper analysis of her claim for relief insofar as the Court never informed the author's counsel that a decision would be adopted on that claim.

3.5 The author argues that she did not submit her communication before because she had continuously tried to seek redress at the national level, even after the Supreme Court's decision. Her removal order was issued on 19 September 2005, pursuant to Section 54 of the Immigration Act 1987, and it remained valid at the time of the complaint. The author also considers that, despite her new application for a residence permit following her marriage to a New Zealander, she could be deported at any time insofar as, under paragraph 11 of the Immigration Act 2009, the New Zealand immigration authorities are under no obligation to consider any new visa application. At the time of the complaint, the author was therefore in hiding for fear of deportation. Taking this situation into account, no interim measure was granted by the Committee.

The State party's observations on the admissibility of the communication

4.1 In its submission of 3 December 2012, the State party requested that the Committee declare the communication inadmissible.

4.2 The State party indicates that, prior[8] to the notification of her communication to the Human Rights Committee, the author was advised by the migration authorities to apply for a work visa. She did so on 6 November 2012 and a work visa was granted on 21 November 2012. The author is therefore no longer unlawful and subject to removal from New Zealand. The State party further specifies that the work visa was granted for an initial term of two years and may be renewed and/or followed by an application for permanent resident status.

4.3 As to the author's son, the State party considers that he has held New Zealand citizenship since birth and therefore does not require immigration permission to remain in the country. The State party argues that, as the communication is entirely concerned with the denial of immigration permission and the related court proceedings, its basis has been removed, and the communication is inadmissible under article 1 of the Optional Protocol.

4.4 The State party considers that the author's claims under articles 2, paragraph 3; 14, paragraph 1; 17, paragraph 1; 23, paragraph 1; and 24 were examined comprehensively and in accordance with those rights by the immigration authorities and the courts. It further considers that the communication makes no allegation of arbitrariness, manifest injustice or other permissible basis on which to revisit those findings. The State party therefore considers that the communication is inadmissible under articles 2 and 3 of the Protocol.

4.5 With regard to the author's claims in respect of family life, the State party considers that they only arose because of the author's pursuit of protracted legal proceedings since immediately after her arrival in New Zealand in 1996. The State party refers to the Committee's jurisprudence in *Rajan* v. *New Zealand*,[9] where it considered that the domestic authorities had contemplated the protection of the children and family at each stage of the process, and that the subsequent time in New Zealand had been "spent either in pursuing available remedies or in hiding", thereby concluding that the author's claims under articles 17, 23 and 24 were insufficiently substantiated, pursuant to article 2 of the Optional Protocol. The State party therefore considers that the author's claims under articles 17, 23 and 24 are inadmissible due to lack of substantiation.

[8] No specific date is provided.

[9] Communication No. 820/1998, *Rajan* v. *New Zealand*, Decision adopted on 6 August 2003, para. 7.3.

4.6 The State party further argues that the author's claims under articles 2, paragraph 3; and 14, paragraph 1; in relation to the hearing and to the determination of the author's appeal by the Supreme Court in May and July 2009 are inadmissible due to non-substantiation and non-exhaustion of domestic remedies. The State party first considers that the Supreme Court's decision to decline the author's request for judicial review was justified. Since 1994, the immigration authorities have been reviewing their approach to asylum seekers with the aim of incorporating the State party's international obligations into national law. The amended legislation gives priority to the best interest of the child and of the family. In three distinct cases, the Supreme Court found that the immigration authorities had not applied the appropriate criteria in the asylum proceedings. However, in the author's case, the Court considered that there had been a comparatively recent assessment of the author's circumstances, and that her counsel had not identified anything relevantly new that had not been considered by the immigration authorities. The State party considers that, had there been any error on the part of the authorities, this would not have had any effect on the outcome of the author's case, and that the author's claim on this point is insufficiently substantiated.

4.7 In addition, the State party considers that the author has not exhausted domestic remedies with regard to articles 2, paragraph 3, and 14, paragraph 1, insofar as the system in New Zealand permits parties to court proceedings to seek recall of a judgement where there has been an exceptional error. The author, who is assisted by counsel, did not avail herself of that possibility and her related claim should therefore be held inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

The authors' comments on the State party's submission

5.1 By submission dated 28 February 2013, the author argues that the fact that she was granted a work permit does not remedy the breach of the Covenant imputable to the State party. Had she not married a New Zealander, the author would never have obtained a work permit and she would have had to return to China. The State party is therefore responsible for a violation of articles 17, 23 and 24 of the Covenant.

5.2 With regard to the Supreme Court's judgement, the author states that, while it was recognized that the immigration officials had erred as a matter of law, relief was denied because there was no change in the factual circumstances of the case. The author considers that the legal error in respect of her family should still be compensated for. The author further contests the reference to *Rajan* v. *New Zealand*,[10] considering that, in her case, she was at risk of deportation during the whole duration of her stay in New Zealand, and that her son was permanently at risk of being separated from his mother.

5.3 As to the moot character of the complaint, the author considers that she has a temporary visa, and that if her relationship with a New Zealand man terminates, she will again be at risk of deportation. The author therefore considers that her immigration status remains unsolved.

5.4 In the light thereof, the author requests that the communication be declared admissible and be considered on the merits of the case.

[10] See footnote 12.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the author's arguments that, should she be deported to China, her family life and the family life of her son would be at risk: her son would either have to remain without his biological parents in New Zealand; or he would have to go with her to China, where he would be considered as a "black child" and would therefore suffer all the civil, economic and social consequences of the Chinese one-child policy. The Committee also notes that the author's son, having held New Zealand citizenship since birth, does not require immigration permission. The author's arguments as to the alleged violation of articles 17 and 23 of the Covenant for the author and her son, and of article 24 for her son alone therefore fully depend on her own migration status. In this regard, the Committee notes that the State party advised the author to apply for a work visa before she submitted her communication to the Committee, but that she only did so afterwards. It also notes that the author was granted a work visa on 21 November 2012 and is no longer subject to deportation from New Zealand.

6.3 The Committee further notes that the author has mentioned on a purely hypothetical basis (i) the eventuality of not having married her present husband, which would have resulted in her not obtaining a work visa, and (ii) the eventuality of her separation from her present husband, following which she would again be at risk of deportation, taking into account the temporary character of her visa. The Committee considers that the latter arguments concerning the present and future marital status of the author do not go beyond the bounds of eventuality and theoretical possibility.[11] Consequently, the author is currently not in a position to claim the status of a victim within the meaning of article 1 of the Optional Protocol.

6.4 With regard to the claim of an alleged violation of articles 2, paragraph 3, and 14, paragraph 1, of the Covenant, the Committee observes that the author makes no allegation of arbitrariness, manifest injustice or other permissible basis on which to revisit the related judicial decisions and proceedings, but only refers to the rights of her ex-husband, who is not a party to the present communication. Thus, the Committee considers that the allegations concerning articles 2, paragraph 3, and 14, paragraph 1, of the Covenant have been insufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[11] See inter alia: communication No. 932/2000, *Gillot et al.* v. *France*, Views adopted on 15 July 2002, para. 10.5.